89-1054

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BITUMINOUS CASUALTY CORPORATION,

Petitioner,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS AND TYRUS R. ATKINSON, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN M. BOVIS
(Counsel of Record)

BOVIS, KYLE & BURCH
53 Perimeter Center East
Atlanta, Georgia 30346
(404) 391-9100

Counsel for Petitioner

December 29, 1989

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383 (404) 659-4080

QUESTION PRESENTED

Whether Rule 11 sanctions are appropriately assessed against a party when that party refuses to dismiss its action after discovery reveals that the Complaint is not well grounded in fact and law.

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Petitioner, Bituminous Casualty Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinions of the United States Court of Appeals, Eleventh Circuit entered in these proceedings on July 20, 1989.

OPINIONS BELOW

This Petition involves two Orders of the District Court Judge William O'Kelley of March 9, 1988 and June 13, 1988 (Appendix B and C) and the Opinion of the United States Court of Appeals, Eleventh Circuit cited in 877 F.2d 938 (11th Cir. 1989) (Appendix A) reversing the two Orders of the trial court.

JURISDICTION

The Eleventh Circuit decision sought to be reviewed was decided and entered on July 20, 1989. Petitioners filed a timely Petition for Rehearing in Banc under the Eleventh Circuit's local rules on August 9, 1989. The Petition for Rehearing in Banc was denied on October 4, 1989. (Appendix D). This Petition is timely filed. Jurisdiction is present under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure is involved in this Petition and is reproduced in full in Appendix E.

STATEMENT OF THE CASE

This Petition arises from a fire that occurred on April 10, 1985 which damaged a building belonging to the Respondent, The Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints ("Respondent" or "Church").

Prior to the April 10 fire, Respondent contracted with Associated Contractors[1] to repair the roof of the facility lo-

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[1] Associated Contractors, along with Russell E. Hoffman, Jimmy Beck, Alpha Professional Insurance Services, Inc., and Bituminous Casualty Corporation were named as defendants to the original action. However, Bituminous Casualty Corporation and Respondents are the only parties to this Petition. Bituminous Casualty Corporation has the following affiliated companies: Bituminous Fire & Marine Insurance Company; Old Republic International Corporation; Great West Casualty; and Bitco Corporation.

cated at Harkers Island, North Carolina. (R1-1)[2] Respondent entered into the contract through its agent and consultant, Roger DeLisle and his company, Building Consultant Services. (R3-65)

Under the terms of the contract, Associated Contractors was obligated to procure liability insurance for the project prior to work commencing. (R1-1) Before Respondent entered into the contract, Roger DeLisle assured Leo Findley, a Church manager, that Associated Contractors had procured the required liability insurance. (R3-68)

Although no certificate of insurance was produced to the Church, Respondent executed the contract. (R1-1) During the repair project, on April 10, 1989, a fire caused substantial damage to the structure. (R1-1)

After the fire had occurred, Building Consultant Services forwarded to the Church a certificate of insurance dated March 10, 1989. Petitioner Bituminous Casualty Corporation ("Petitioner" or "Bituminous") purportedly issued the certificate through its agency, Alpha Professional Insurance Services, Inc. (R1-1). Russell Hoffman was both an agent of Alpha Professional Insurance Services and a principal of Associated Contractors. The president of Alpha Professional Insurance Services, Bruce Jenkins, denied that his agency ever issued the certificate or arranged for insurance. (R1-7)

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[2] All references to the Record will be designated as "R". Because the Record contains several volumes, the first number after the letter "R" indicates the appropriate volume of the Record.

The Church then hired Bruce Potts to investigate the matter of the insurance certificate, cause of the fire, and the damage. (R7-158) Potts interviewed the characters involved and found strong evidence that the insurance was not procured before the fire. (R9; R1-7) After Potts reported his findings to the Church and the Church was aware of a problem with the insurance coverage (R3-68), the Church hired Respondent attorney, Tyrus Atkinson, to represent the Church to recoup its loss. (R7-158)

On September 24, 1986, Respondent filed a Complaint in the United States District Court, Northern District of Georgia, against Russell E. Hoffman, Associated Contractors, Inc., Jimmy Beck, Alpha Professional Insurance Services, Inc., and Bituminous Casualty Corporation. (R1-1) Jurisdiction was based on 28 U.S.C. § 1332(a)(1). (R1-1)

The claim against Bituminous was based on the premise that the certificate of insurance was allegedly procured before the fire had occurred. (R1-1) Bituminous answered and filed a counterclaim and cross-claim for declaratory and equitable relief. (R1-6)

Over the next six months, the parties engaged in substantial discovery. During the course of discovery, it became obvious that the insurance was not procured before the fire loss. As a result, on March 16, 1987, John M. Bovis, attorney for Bituminous, wrote counsel for Respondent asking him to voluntarily dismiss the claims against Bituminous, and if such action was taken by March 31, 1987, Bituminous would not seek attorney's fees and sanctions against Respondent. (R1-47) On April 3, 1987, counsel for Respondent advised counsel for Bituminous that the Respondent refused to dismiss its action and intended to proceed against Bituminous

relying upon the same allegations set forth in the original complaint. (R1-47)

Thereafter, Bituminous notified the Court that Bituminous believed a violation of Federal Rule of Civil Procedure 11 had occurred. (R1-47) Responding to the notice of Bituminous, Respondent then filed a Motion to Amend its pleadings to change the nature of its allegations. (R1-48). After oral argument, Respondent then served a Motion for Voluntary Dismissal on July 8, 1987, seeking leave to voluntarily dismiss its action against Bituminous with prejudice. (R4-90) The District Court granted the Motion, and on August 4, 1987, Bituminous filed its Motion seeking attorney's fees and costs of litigation. (R4-98) By Order dated March 9, 1988, District Court Judge William C. O'Kelley granted Bituminous' Motion and assessed Rule 11 sanctions against the Respondents in the amount of $19,891.99. (R7-157) (See Appendix B)

On March 22, 1988, Plaintiff served a Motion for Reconsideration, along with new affidavits not previously filed. (R7-158) The District Court denied this Motion by Order entered June 13, 1988. (R7-162) (See Appendix C)

On June 21, 1988, Respondent filed its Notice of Appeal to the United States Court of Appeals, Eleventh Circuit. (R7-163) On July 20, 1989, a panel of the Eleventh Circuit reversed the District Court's decision. The Eleventh Circuit issued its decision and specifically found that Respondent affirmatively continued its action even though there was no evidence to support the claim. Notwithstanding this finding, the Eleventh Circuit reversed the District Court relying on the position that Rule 11 does not impose a continuing duty on counsel to amend or withdraw previous pleadings when

their factual or legal basis dissolves. Rather, the party and counsel who file such a pleading only need not oppose a Motion to Dismiss. Thus, the District Court's Rule 11 sanctions were improperly imposed. (Appendix A)

Bituminous thereafter filed a timely Petition for Reconsideration In Banc, but the Eleventh Circuit denied Bituminous' Petition on October 4, 1989. (Appendix D)

REASONS FOR GRANTING THE WRIT

This Court should grant the Writ of Certiorari for two reasons: (1) the Eleventh Circuit's opinion from which Petitioner seeks review is in conflict with decisions other circuit courts of appeals have rendered and; (2) the sole Rule 11 issue of this Petition involves an important question of federal law that has not yet been, but should be, settled by this Court.

The basic issue before this Court is whether Rule 11 imposes a continuing obligation upon an attorney to reassess his or her position during the course of litigation. Specifically, the issue is whether Rule 11 sanctions are appropriate when a plaintiff continues to pursue its claim even though discovery reveals that the claim is groundless in fact and law.

In deciding this issue, the circuit courts of appeals are severely split. As the Eleventh Circuit admitted in its decision from which Petitioner seeks review, "[T]he circuit courts of appeals appear to differ on whether Rule 11 imposes a continuing duty on counsel to amend previous pleadings when their factual or legal basis dissolves." *Corporation of the Presiding Bishop of the Church of Jesus Christ*

of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938, 942 (11th Cir. 1989). Hence, the Eleventh circuit had to render a decision on the issue without a clear line of authority.

From this precarious starting position, the Eleventh Circuit went on to hold that Rule 11 does not impose a continuing obligation on an attorney. *Corporation of the Presiding Bishop*, 877 F.2d at 943. Thus, the Eleventh Circuit found that the District Court erred in granting attorney's fees to Petitioner even though Respondents continued to pursue a groundless claim.

In so holding, the Eleventh Circuit adopted the reasoning of the Fifth Circuit that Rule 11 scrutinizes only initial pleadings and rejects hindsight analysis to determine whether an attorney's actions were appropriate. The Eleventh Circuit concurred in the analysis set forth in the Fifth Circuit en banc decision of *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988). In agreeing with the Fifth Circuit that Rule 11 does not impose a continuing obligation on attorneys to reassess their positions in litigation, the Eleventh Circuit opinion rejected a prior contrary holding of the Eleventh Circuit.[3] *Corporation of the Presiding Bishop*, 877 F.2d 938, 943, n. 7. Nevertheless, the Eleventh Circuit panel wholly adopted *Thomas*.

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[3] In *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987), the Eleventh Circuit panel affirmed a Rule 11 sanction of attorney's fees where the plaintiff continued to litigate a matter that discovery had shown was groundless in fact. The Court held: "[W]hen it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest." *Collins*, 834 F.2d at 965.

In *Thomas*, the plaintiffs filed a discrimination suit against their employer. After the employer prevailed at trial, it moved for attorney's fees under Rule 11. Although the district court found Rule 11 violations had occurred, the court failed to sanction the plaintiffs' attorney. The Fifth Circuit panel remanded to require the court to impose sanctions and further held that: "Rule 11 imposes upon attorneys several affirmative duties, including the continuing obligation to reevaluate one's litigation position." *Thomas*, 836 F.2d at 869.[4] The en banc Fifth Circuit reviewed the holding concerning the scope of Rule 11.

In analyzing Rule 11 as it applied to the panel's holding, the en banc Fifth Circuit rejected the panel's reasoning and concluded that "Rule 11 applies only to the signing of pleadings and imposes a standard of good faith and reasonable investigation as of the date of that signing." *Thomas*, 836 F.2d at 874. The Fifth Circuit reasoned that Rule 11 mainly applies to initial pleadings and does not apply to subsequent actions or filings by an attorney after the litigation has commenced. By reasoning that Rule 11 scrutinizes the initial pleadings and by rejecting hindsight analysis, the Fifth Circuit, en banc, reversed the panel's holding as well as prior Fifth Circuit decisions holding that Rule 11 imposes a continuing obligation on an attorney to reassess his or her position during the course of litigation.[5]

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[4] The original panel decision is published at 812 F.2d 984 (5th Cir. 1987).

[5] See, for example, *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1127 (5th Cir. 1987), which held that "[C]ounsel have a continuing obligation to review and reevaluate their position as the case develops"; "[u]pon discovering that a good faith basis [for a document] no longer exists, it is incumbent upon the appropriate counsel and party to take the

In following the en banc Fifth Circuit decision, the Eleventh Circuit also adopted a decision from the Second Circuit as well as the reasoning set forth in a footnote from a Seventh Circuit decision. In *Oliveri v. Thompson*, 803 F.2d 1265 (2nd Cir. 1986), the Second Circuit Court of Appeals reversed an order allowing for attorney's fees under Rule 11. There, the district court had ordered attorney's fees sanctions against the plaintiff and his lawyer for instituting a groundless action and for continuing to pursue the action after discovery revealed that the claim was groundless in fact and in law. *Oliveri*, 803 F.2d at 1271. Thus, the district court accepted the view that Rule 11 imposed a continuing obligation on an attorney to discontinue an action once it is found that the claim is meritless.

In reversing the district court's order granting Rule 11 sanctions, the Second Circuit adopted the position that Rule 11 deals only with initial pleadings and signed papers. As a result, the Second Circuit flatly rejected the notion that Rule 11 imposes a continuing obligation on an attorney to reassess his or her position during litigation and to discontinue an action if discovery reveals that it is groundless. *Oliveri*, 803 F.2d at 1274.

Not only did the Eleventh Circuit follow the *Oliveri* decision, but it also favorably cited dicta in a footnote in *Hamer v. County of Lake*, 819 F.2d 1362 (7th Cir. 1987). *Hamer* was a case dealing with a 42 U.S.C. § 1983 claim as applied to an Illinois tax assessment provision. The case was not de-

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necessary actions to ensure that the proceedings do not continue without a reasonable basis in law and fact."

cided on Rule 11 grounds, but the district court granted attorney's fees under 42 U.S.C. § 1988. The Seventh Circuit rendered its decision solely on 42 U.S.C. § 1983 and § 1988 grounds but in a footnote stated that "Rule 11 does not impose a continuing obligation on attorneys to reevaluate the merits of the case as the litigation develops." *Hamer*, 819 F.2d at 1370, n. 15. Thus, the Eleventh Circuit opinion cited this footnote as authority for the proposition that Rule 11 simply does not impose any obligation on an attorney after he or she files the complaint.

Thus, the Eleventh Circuit decision from which Petitioner seeks review, the en banc Fifth Circuit decision of *Thomas*, the Second Circuit decision of *Oliveri*, and the statements of the *Hamer* court comprise the decisions among the circuit courts of appeals holding that Rule 11 does not impose a continuing obligation on an attorney. This holding and line of reasoning is in direct conflict with the other circuit courts of appeals that have rendered a decision on this issue as well as opinions within their own circuits.

Though the Eleventh Circuit decision in the case at bar cites *Oliveri* and *Hamer* as supporting its view that Rule 11 does not impose any continuing obligation, the circuits from which these opinions were decided are themselves split. The Second Circuit is clearly in conflict in this issue. *City of Yonkers v. Otis Elevator Company*, 844 F.2d 42 (2nd Cir. 1988) is a decision directly in conflict with *Oliveri*. In *Yonkers*, the City attempted to keep the Otis Elevator Company, a major employer, within the city limits when Otis announced that it was closing its manufacturing plant. To keep Otis in Yonkers, the City filed suit against Otis claiming that a prior contract signed by both parties contained provisions that

Otis promised to remain in Yonkers for sixty years. These contract terms never existed, and discovery soon revealed that fact as well as revealed that the City's claim was groundless in both fact and law.

After discovery revealed that the City's claim was groundless, the *Yonkers* litigation took on a strikingly similar scenario as did the litigation in this case. There, after discovery, the attorney for Otis requested the City to withdraw its claim. After the City refused to do so and continued to litigate, Otis was compelled to file a summary judgment motion. After the filing, the City withdrew its claims, and the motion was granted. The district court then assessed Rule 11 sanctions of attorney's fees against the City for continuing the action and forcing Otis to move for summary judgment. *Yonkers*, 844 F.2d at 49. The Second Circuit Court of Appeals affirmed the trial court's order sanctioning the City and accepted the view that Rule 11 sanctions were appropriate where the City's attorneys continued the action though requested to dismiss the action after discovery revealed the action was groundless. *Yonkers*, 844 F.2d at 49.

Another decision from the Second Circuit further shows that the Second Circuit is itself split on the issue of whether Rule 11 imposes a continuing obligation. In *Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71 (2nd Cir. 1985), the district court denied the defendant's motion for Rule 11 sanctions of attorney's fees though discovery showed that the plaintiff's claim was groundless in fact and law. The Second Circuit Court of Appeals remanded the case back to the district court so that the district court may consider "whether appellant should have continued this action after completion of discovery." *Lane*, 758 F.2d at 73. Thus, the Second

Circuit in *Lane* accepted the premise that Rule 11 sanctions for attorney's fees may be appropriate where an attorney pursues a claim in spite of the fact that discovery has revealed no facts upon which plaintiff can establish his claim.

Not only is the Second Circuit itself split on this issue, but the Seventh Circuit is likewise in conflict. The decisions rendered in *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024 (7th Cir. 1988) and *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451 (7th Cir. 1987) are in conflict with the footnote cited in *Hamer*. *Flip Side Productions* involved a claim by a concert promoter that other promoters and managers of concert facilities violated provisions of both the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act. During the course of the litigation, the discovery revealed no facts that would support either of the plaintiff Flip Side's claims. The trial court concluded that these claims were completely groundless as applied to Tempo, one of the defendants. *Flip Side Productions, Inc.*, 843 F.2d at 1036. However, in spite of the fact that its claim was groundless, the plaintiff continued to pursue the claim against Tempo. The trial court granted Rule 11 sanctions to Tempo against the plaintiff Flip Side. *Flip Side Productions, Inc.*, 843 F.2d at 1035.

The Seventh Circuit Court of Appeals affirmed the Rule 11 sanctions imposed against the plaintiff Flip Side. The Court reasoned that because Flip Side continued to pursue a groundless claim, sanctions were appropriate. The Court held:

> At the close of discovery, because Tempo was not implicated in an antitrust or RICO violation, Flip

> Side was obligated to dismiss Tempo or suffer the consequences. Flip Side apparently chose the latter, and the district court, in its discretion, based upon "the actual position" Flip Side took, imposed sanctions. We hold that under these circumstances the district court properly imposed sanctions pursuant to Rule 11. *Flip Side Productions, Inc.*, 843 F.2d at 1036.

Thus, the Seventh Circuit explicitly adopted the position that Rule 11 does impose a continuing obligation upon an attorney such that Rule 11 requires an attorney to dismiss a claim once discovery reveals that it is groundless.

Another Seventh Circuit decision supports the conclusion that the Seventh Circuit follows the holding that Rule 11 does impose a continuing obligation and further reveals the reasoning behind this holding. In *Pantry Queen Foods, supra*, the plaintiff alleged that the defendant interstate carrier negligently failed to deliver a piece of restaurant equipment during a shipment from the third-party defendant. During the course of discovery, the parties found that the interstate carrier was not negligent and did not lose the piece of equipment during shipment but rather that the third-party defendant, the restaurant equipment supplier, never sent the piece of equipment in question. Thereafter, the defendant interstate carrier was granted summary judgment and Rule 11 sanctions were imposed against the supplier.

The supplier appealed and the Court reasoned that not only does Rule 11 apply to the initial pleadings, but Rule 11 also applies to every single filing that occurs during the course of litigation. The Court went on to state that the third-party defendant supplier could not continue to assert

that it had in fact shipped the piece of equipment when discovery revealed that it did not. *Pantry Queen Foods, Inc.*, 809 F.2d 454. Thus, Rule 11 does impose a continuing obligation upon an attorney to reassess his of her position as discovery reveals facts that may or may not support the claim. However, because the Court found that the supplier did not in fact continue to assert that it shipped the equipment after discovery, Rule 11 sanctions were improper. *Pantry Queen Foods, Inc.*, 809 F.2d at 454.

The line of reasoning of these Second and Seventh Circuit opinions that Rule 11 applies to all papers filed during the course of litigation and the holding that an attorney has a continuing obligation to reassess the validity of the claim is followed by decisions in the First, Sixth and Eighth Circuits.

Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988) is a First Circuit decision that contains facts similar to the case at bar. There, the plaintiffs were potential condominium buyers on the island of Nantucket. The plaintiff sued the salesman, the owners, and developers of the condominium when the owners refused to execute the transaction. In the suit, the plaintiffs sued the salesman for fraud and other claims. After discovery revealed that the actions against the salesman were completely groundless, the plaintiffs continued to pursue the groundless claims and furthermore opposed the salesman's Motion to Dismiss. After being dismissed from the action, the Arbitration Panel awarded the defendant salesman sanctions for his attorney's fees under Rule 11. The district court affirmed the sanctions. The First Circuit affirmed this decision and held that the Rule 11 sanctions were appropriate where the plaintiffs

continued to assert their baseless claims (especially the fraud claim) after discovery revealed that the claims were completely groundless. *Muthig,* 838 F.2d at 606. In its reasoning, the First Circuit also believed that Rule 11 is properly applied to all filings during the course of litigation and the plaintiff's opposition to the defendant salesman's Motion to Dismiss violated the rule. *Muthig,* 838 F.2d at 606. Thus, the First Circuit joins those decisions that hold Rule 11 sanctions appropriate where a plaintiff continues to assert a baseless claim.

Along with the First Circuit, the Sixth Circuit adopts the same view. In *Herron v. Jupiter Transportation Company,* 858 F.2d 332 (6th Cir. 1988), a case once again factually similar to the one at bar, the defendant's attorney asked the plaintiff's attorney to dismiss the plaintiff's complaint on the ground that the claim of breach of contract was groundless. The plaintiff's attorney refused to dismiss the claim upon removal to the district court and pursued discovery. After discovery revealed that no facts supported the plaintiff's claim, the defendant moved for a dismissal of the complaint. The district court granted the motion as well as sanctions for attorney's fees under Rule 11.

The Sixth Circuit fully supported the reasoning of the district court and affirmed the decision. The Sixth Circuit wholeheartedly adopted the position that Rule 11 imposes a continuing obligation on an attorney. As the Court held:

> Permitting plaintiffs to continue to litigate a frivolous claim in federal court . . . when a reasonably diligent inquiry at that time would have disclosed the complaint to be without support either

> in fact or law would undercut the full force intended by Rule 11.
>
> This position is consistent with similar Rule 11 cases that have concluded that an attorney and the litigant have a continuing obligation to review and reevaluate their pleadings, motions and other papers, and upon discovery that such papers were without merit, to immediately dismiss the action at the risk of inviting the imposition of Rule 11 sanctions. *Herron*, 858 F.2d at 336.

Thus, the Sixth Circuit followed the precedent set by *Yonkers* and *Flip Side Productions, Inc.*, as well as decisions within its own circuit[6] to impose sanctions where an attorney fails to dismiss a claim after discovery reveals that it is groundless.

Likewise, the Eighth Circuit holds that Rule 11 imposes a continuing obligation upon an attorney to reevaluate the validity of its claim during the course of litigation. In *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d 613 (8th Cir. 1988), the Eighth Circuit affirmed a sanction of Rule 11 attorney's fees against an attorney who continued to pursue a defense though discovery revealed that the defense had no merit. After depositions of the defendant's officers revealed that there was "clear liability", the defendant continued to pursue the defense of the claim. *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d at 614. The Eighth Circuit held that this action by the attorney was enough to merit Rule 11 sanctions.

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[6] See, for example, *Michaels Building Co. v. Ameritrust Company*, 848 F.2d 674 (6th Cir. 1988).

Somewhere between this conflict among the circuits lies the Third Circuit. Exactly where the Third Circuit lies on this issue is difficult to discern from the decision of *Gaiardo v. Ethyl Corporation*, 835 F.2d 479 (3rd Cir. 1987). Though the Eleventh Circuit cites this opinion in support of its conclusion that Rule 11 imposes no continuing obligation on an attorney, the decision seems to create precedent for both sides of this issue. As the *Gaiardo* court held: "cases which impose a continuing duty on counsel to make amendments based on knowledge ascertained after filing are not consistent with the Rule." *Gaiardo v. Ethyl Corporation*, 835 F.2d at 484. This statement seems to indicate that the Third Circuit joins those circuits that impose no continuing obligation under Rule 11.

However, this same Court further stated that: "[N]otwithstanding the emphasis on the time of initial submission, however, parties will not be entitled to continuing immunity [from sanctions] if they acquire or should acquire knowledge under the Rule's standard before a later filing. Subsequent papers must be judged by information available when they are filed." *Gaiardo v. Ethyl Corporation*, 835 F.2d at 484. Thus, this statement can fairly be construed as agreement by the Third Circuit with the other circuits that impose a continuing obligation on an attorney. As this decision espouses both lines of reasoning that are in conflict among the circuits, the Third Circuit decision cannot fairly be placed in either group.

The Fourth, Ninth, Tenth and District of Columbia Circuits appear to be silent on this issue.

In sum, the Circuit Courts of Appeals are clearly in conflict on the issue of whether Rule 11 sanctions are appropriate against an attorney who fails to dismiss his claim

though discovery reveals that the claim is not well grounded in fact and law. On the one side is the Eleventh, Fifth, one decision from the Second Circuit, and a footnote in a decision of the Seventh Circuit that hold the view that Rule 11 does not impose any continuing obligation upon an attorney such that sanctions would not be appropriate where that attorney fails to dismiss a claim that discovery reveals is groundless. These decisions support the reasoning that Rule 11 only involves initial pleadings.

On the other side, decisions from the First, Second, Sixth, Seventh, and Eighth Circuits clearly hold that Rule 11 does in fact impose a continuing obligation on an attorney such that Rule 11 would require an attorney to dismiss a claim that discovery reveals is groundless and if the attorney fails to do so, he or she runs the risk of sanctions. These courts espouse the reasoning that Rule 11 applies to all filings regardless of when they occurred during litigation.

The second reason why this Court should grant a Writ of Certiorari needs only brief mention. This Court should review this issue as it is an important question of federal law.

The issue whether Rule 11 requires an attorney to dismiss a claim after discovery reveals the claim is groundless in fact and law is of great import to every practitioner before the federal courts. This issue not only defines the boundaries of Rule 11, but it also defines appropriate conduct for attorneys. A decision on this issue will bring a better focus to exactly what conduct Rule 11 tolerates and will tell attorneys what conduct is permissible under Rule 11. With a decision, an attorney will no longer wonder if continued pursuit of a dubious claim or how long pursuit of

such a claim may subject him or her to sanctions. In addition, a decision will aid attorneys who practice before federal courts in several circuits that are in conflict; a decision will standardize conduct.

Furthermore, the issue touches the larger consideration of judicial resources. This Court needs to conserve valuable judicial resources whenever possible. A decision on this issue will appropriate judicial resources by either permitting or prohibiting attorneys to continue litigating once discovery reveals a claim is groundless. Hence, this issue not only involves attorney conduct but also concerns the fundamental issue of how the federal court system operates.

CONCLUSION

For the foregoing reasons, Petitioner prays to this court to grant the Writ of Certiorari to review the opinion of the Eleventh Circuit.

JOHN M. BOVIS
(Counsel of Record)

BOVIS, KYLE & BURCH
53 Perimeter Center East
Third Floor
Atlanta, Georgia 30346
(404) 391-9100

Counsel for Petitioner

December 29, 1989

Appendix A

**In the United States Court of Appeals,
Eleventh Circuit.**

July 20, 1989

No. 88-8466

**CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
Plaintiff-Appellant.**

v.

**ASSOCIATED CONTRACTORS, INC.,
Russell E. Hoffman, Jimmy Beck, Alpha Professional Services, Inc., Defendants.**

**Bituminous Casualty Corporation,
Defendant-Appellee.**

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

A lawyer's duty under Rule 11 of the Federal Rules of Civil Procedure is at issue in this case. We conclude that the

district court erroneously awarded Rule 11 sanctions against the plaintiff and its attorney; accordingly we reverse.[1]

I.

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints (the "Church") entered into a contract with Associated Contractors in February 1985 to repair the roof of a building on Harkers Island, North Carolina. On April 10, 1985, during the repair, a fire occured which caused substantial damage to the building. This litigation arose from the Church's attempt to secure compensation for its loss.

Before the repair contract was signed, Associated Contractors was obligated to procure insurance on the project and provide a certificate evidencing the insurance to Build-

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[1] Bituminous asserts that because the Church filed a notice of appeal in the name of the Church, and the award of fees was joint and several against the Church and its counsel, this court lacks jurisdiction over the counsel's appeal. *Marshak v. Tonetti*, 813 F.2d 13 (1st Cir.1987) (appellant-client lacked standing to appeal award of Rule 11 fees against attorney). In several cases, however, we entertained jurisdiction over an award of fees made against the attorney in which the appeal was filed in the name of the client. *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (in banc) (fees assessed only against attorney, appeal taken in name of client); *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848 (11th Cir.1988) (same); *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512 (11th Cir.1988) (fees assessed against client and attorney, appeal taken only in name of client). In light of this authority and because of the close privity between a lawyer and his client with respect to the conduct of litigation, it would be unjust to refuse to hear counsel's appeal; we therefore excuse any omission. *Cf. G.E. Smith & Associates Inc. v. Otis Elevator Company*, 608 F.2d 126, 127 (5th Cir.1979) (only one co-plaintiff filed appeal; co-plaintiffs were not "one and the same but [were] different entities in contract with one another, one as owner and the other as party to do construction work;" court dismissed appeal).

ing Consultant Services (BCS), the Church's local agent; prior to execution of the contract, Roger DeLisle (who along with his wife is a principal of BCS) assured Leo Findlay, the Church's regional manager, that the project was insured. After the fire, BCS forwarded to the Church a certificate of insurance dated March 10, 1985. The certificate—ostensibly drafted by Alpha Professional Services, a registered agent of the defendant Bituminous Casualty Corporation—recited that Associated Contractors was insured by "Bituminous Casualty Company." Associated Contractor's principals, Russell and Rosalind Hoffman, were also employees of Alpha.

BCS requested Associated Contractors to notify its insurance carrier, but no insurance adjuster arrived on Harkers Island. BCS and the Church mailed letters requesting action to Alpha and Bituminous, but neither Alpha nor Bituminous responded. Somewhat concerned, the Church hired Bruce Potts, a private arson investigator, to look into the matter of insurance.

Potts spoke with management employees at Associated Contractors, BCS and Alpha. Aware of a burgeoning problem with its insurance coverage, the Church retained attorney Tyrus Atkinson in April 1986 to represent it in connection with the Harkers Island loss. In September 1986 the Church commenced suit against Mr. Hoffman, Associated Contractors, Alpha, and Bituminous.

Bituminous filed an answer in which it denied liability to the Church. In March 1986, after conducting substantial discovery, Bituminous requested the Church voluntarily to dismiss the claims against it, threatening a Rule 11 motion for sanctions were dismissal not forthcoming. The Church

responded in April, stating that it intended to proceed with the original complaint against Bituminous. Bituminous then moved to amend its answer and assert a Georgia-law counterclaim against the Church for frivolous litigation, and likewise alleged a Rule 11 violation. The Church immediately filed a motion to amend its complaint, seeking to change its allegations against Bituminous.

In June, the district court denied Bituminous's motion to amend its answer, and announced that it would hold a hearing to consider the Church's motion to amend. Following oral argument, the Church served a motion for voluntary dismissal of Bituminous. Bituminous refused to be dismissed, preferring to remain in the action to settle matters between itself and Mr. Hoffman, but moved for attorneys' fees and costs against the Church pursuant to Rule 11. The district court granted the Church's motion to dismiss Bituminous, stating that it would not consider Bituminous's motion for costs and fees until the Church was given an opportunity to respond to the Rule 11 allegation.

In its brief in support of Rule 11 sanctions, Bituminous argued that "[c]entral to the allegations of the . . . Complaint is the premise that the Church had in its possession prior to the April 10, 1985 fire a Certificate of Insurance." Bituminous then devoted several pages to explaining why the Church knew or should have known that BCS, the Church's agent, did not have a certificate prior to the fire. Bituminous quotes Findlay's April 1987 deposition, in which he indicated that "possibly" within three of four months after the fire, he was aware that the insurance certificate had not been received prior to the fire. Bituminous also quotes a November 1986 affidavit of Roger DeLisle:

> There is controversy over the cause of the fire and I found a local investigator, Bruce Potts, and he was hired by the Church. I have given Mr. Potts essentially the same information about the Certificate, in that I did not have a Certificate of Insurance when the job started and I did not realize that I did not have a Certificate until after the fire.

Concluded Bituminous: "the factual premise which was the only basis for naming Bituminous in the original Complaint—that is, that [the Church] had a Certificate of Insurance with Bituminous' name on it prior to the fire, is completely incorrect."[2]

The Church responded explaining the basis for its allegations against Bituminous: The Church relied on Mr. Hoffman's oral misrepresentation that the project was insured as well as the receipt of the insurance certificate prior to the fire; even though subsequent discovery may have cast doubt on the proposition that the certificate was received prior to the fire, the substantive allegations against Bituminous still held under an agency theory of liability—Bituminous could be liable for the neglect of Alpha, which in turn could be liable for the tales of Hoffman, Alpha's agent. *See Stillson v. Prudential Ins. Co. of America*, 202 Ga. 79, 42 S.E.2d 121 (1947) (insurance company can be liable for the fraud of its agent). Further, noting that the certificate recited on its face that it was issued on March 10, 1985, the Church

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[2] Bituminous also stated that a certificate was found that was dated after the fire and word "void" was marked across its face. As the Church pointed out in response, however, nothing suggests that this certificate was known to the Church at the filing of the complaint.

claimed that it was entitled to rely upon a Georgia statute to establish that the date was presumptively correct.[3]

Oral argument of the Rule 11 motion was held in November 1987. In its subsequent order, the district court found a Rule 11 violation and granted Bituminous's motion for costs and fees. The court stated as follows:

> At the time [Bituminous threatened a Rule 11 motion], the parties had conducted considerable discovery and all evidence at that point revealed that [the Church] did not have a certificate of insurance before the fire . . . .
>
> It would seem that a reasonable inquiry in a case such as this one would include a review of the certificate upon which the [Church] actually relied and an investigation concerning exactly when the document was received. Obviously such an investigation was not undertaken in this case . . . .
>
> A reasonable inquiry in this case by [the Church] should have included an examination of the certificate of insurance that [the Church] allegedly relied upon and an investigation into

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[3] Appended to the response was the January 1987 affidavit of Mr. DeLisle; in this statement DeLisle repudiated the statement he gave in November 1986. Responding to Bituminous's argument that Findlay was aware early on that a certificate had not been received prior to the fire, the Church quoted a portion of the Findlay deposition omitted by Bituminous, in which Findlay stated that he was unaware until the date of the deposition that the certificate was received after the fire. The district court found that "[t]he testimony of Findlay does not illustrate that the plaintiff knew that the certificates were received after the fire, only that there was a problem with the certificates." No. 1:86-cv-2055-WCO, mem. op. at 9 (N.D.Ga. Mar. 9, 1988).

> when the certificate was received by the [the Church or its] representatives before the factual allegation that [the Church] relied upon the certificate of insurance *received before the fire* was included in the complaint. Although [the Church] contends that the reliance on a certificate received before the fire is insignificant to its claims against the defendants, the factual allegation that plaintiff had a certificate which it thought was valid underlies all the [Church's] allegations of fraud and conspiracy against defendant[s] Alpha [and Bituminous].

No. 1:86–cv–2055–WCO, mem. op. at 10–11 (N.D.Ga. Mar. 9, 1988) (emphasis in original). The court assessed Rule 11 sanctions jointly and severally against the Church and its counsel. The Church quickly served a motion for reconsideration, proffering affidavits of counsel, Potts, and Mr. DeLisle that showed the extent to which the provenance of the certificate had been investigated prior to filing the complaint. In a subsequent order the court acknowledge that a pre-filing investigation had occurred, but denied the Church's motion, finding that no reliance on any of the DeLisles' statements concerning the certification was reasonable.

II.

In relevant part, Rule 11 requires the attorney who submits a pleading to certify that "to the best of [the attorney's] knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ." Fed.R.Civ.P. 11. "Under [Rule 11,] the district court must fo-

cus on what was reasonable for an attorney to believe at the time the pleadings were filed, not on what the court later finds to be the case." *Threaf Properties v. Title Ins. Co. of Minnesota*, 875 F.2d 831-835 (11th Cir.1989).

In requesting Rule 11 sanctions, Bituminous argued that the Church did not have a reasonable basis for alleging that BCS had received a certificate of insurance prior to the fire. In its response the Church largely finessed the point, arguing that this factual question was of no great moment because the allegations against Bituminous would stand even if BCS received no certificate until after the fire. As noted above, however, the district court held that "the factual allegation that plaintiff had a certificate which it thought was valid underlies all the [Church's] allegations of fraud and conspiracy against defendant [Bituminous]."

Examining the face of the complaint only, the court's conclusion was correct because the complaint failed to allege an agency relationship between Mr. Hoffman and Alpha. Moreover, the Church's response to the Rule 11 motion did not supply the missing information to establish an agency relationship between Hoffman and Alpha; at most, the affidavits appended to the response state that the Hoffmans sold an insurance business to Alpha, and that Mrs. Hoffman was employed by Alpha. Not until its motion for reconsideration did the Church finally produce an affidavit alleging that Mr. Hoffman was Alpha's agent.[4]

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[4] The Church's amended complaint, which was filed before the Rule 11 proceedings, alleged that Mr. Hoffman was Alpha's agent but did not provide anything to substantiate the bare allegation.

Even had the complaint sufficiently alleged an agency relationship between Hoffman and Alpha, the better course for the Church in responding to Bituminous's Rule 11 motion would have been to expose explicitly the basis upon which it made its factual allegation concerning the arrival date of the certificate, for in the absence of such an exposition, the district court could have awarded Bituminous fees and costs reasonably incurred to investigate the arrival date. Nevertheless, the response did contain enough information to show the district court that the Church had a reasonable basis for its allegation that BCS received the certificate prior to the fire. The response noted that the insurance certificate in BCS's possession was dated March 10, 1985, a full month prior to the fire. The Church called attention to O.C.G.A. 11-1-202, which provides that

> A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima-facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

O.C.G.A. § 11-1-202 (Michie 1982) (U.C.C. § 1-202).

Section 11-1-202 may only clearly apply to contracts governed by the Uniform Commercial Code, and a contract for building repairs would not likely fall under the Code. *E.g., Dixie Lime & Stone Co. v. Wiggins Scale Co.*, 144 Ga.App. 145, 240 S.E.2d 323 (1977). Nonetheless, in the absence of a Georgia case on point or the heavy weight of authority to the contrary, we cannot say that a lawyer could not make a "good faith argument for the extension" or "modification"

of this provision to contracts involving services (and thus posit the prima facie genuineness of facts stated in certificates of insurance issued by third parties to satisfy obligations under a services contract). That said, on the basis of this statutory presumption counsel for the Church reasonably could have concluded that the date on the certificate of insurance could be used as prima facie evidence that BCS received the certificate prior to the fire;[5] unless, of course, the lawyer knew to the contrary. Significantly, the district court did not find that counsel or the Church *knew* at the commencement of the action that no certificate had been received prior to the fire.[6]

At the time Bituminous threatened Rule 11 sanctions, all sides agree that the evidence could not be shaped to show that BCS received a certificate prior to the fire. Yet in a letter to Bituminous, the Church maintained its refusal voluntarily to dismiss Bituminous from the action. Bituminous argues that even if the Church did not violate Rule 11 upon the filing of its complaint, this subsequent conduct constituted a Rule 11 violation.

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[5] The certificate was dated a full month prior to the fire. Associated Contractors was under a duty to deliver the certificate to BCS. Allowing a few days for mailing and administrative delay, it was at least plausible that BCS received the certificate prior to the fire.

[6] As the district judge found, Findlay's deposition does not show that the Church "knew" prior to the filing of suit that no certificate was received prior to the fire. *See supra* n. 3. Although the November 1986 affidavit of Roger DeLisle, filed by Bituminous, might suggest that the Church at least had notice that no certificate was received, Mr. DeLisle repudiated his November 1986 statement in the January 1987 affidavit appended to the Church's response. (As an aside, in February 1987, Mr. DeLisle once again changed his mind.)

By its terms, Rule 11 imposes an obligation on counsel at the time he or she files papers in the district court. The circuit courts of appeals appear to differ on whether Rule 11 imposes a continuing duty on counsel to amend previous pleadings when their factual or legal basis dissolves. *Compare Thomas v. Capital Security Services*, 836 F.2d 866, 874 (5th Cir.1988) (in banc) (disagreeing with "earlier decisions by this Court that impose upon an attorney a continuing obligation under Rule 11. Instead, we believe that a construction of Rule 11 which evaluates an attorney's conduct at the time a 'pleading, motion, or other paper' is signed is consistent with the intent of the rulemakers and the plain meaning of the language contained in the rule."); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir.1987); *Hamer v. County of Lake*, 819 F.2d 1362, 1370 n. 15 (7th Cir. 1987); *and Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987) *with Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir.1988) (agreeing with cases that imposed a continuing obligation); *Flip Side Productions v. JAM Productions*, 843 F.2d 1024, 1036 (7th Cir.1988) (holding without discussion that "[a]t the close of discovery, . . . [plaintiff] was obligated [by Rule 11] to dismiss [defendant] or suffer the consequences"); *and Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71, 73 (2d Cir.1985) (holding without discussion of Rule 11 cases that in assessing Rule 11 sanctions, district court should consider "whether appellant should have continued this action after completion of discovery").

We agree with the reasoning of the unanimous in banc Fifth Circuit; Rule 11 did not impose a continuing obligation

on the Church to amend its complaint, at least if the complaint was reasonably interposed in the first place.[7] When the Church could no longer reasonably assert that BCS possessed the certificate prior to the fire, Rule 11 would have prevented the Church from raising that ground in opposition to a motion to dismiss.[8]

REVERSED.

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[7] *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987), is not to the contrary, despite a comment in dicta. *See id.* at 965 ("When it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest."). In *Collins*, the court upheld an award of Rule 11 fees against attorneys who after reasonable inquiry should not have signed the complaint. *Id.* at 966.

[8] All post-appeal motions and cross-motions for sanctions are DENIED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS	:	
VERSUS	:	1:86-cv-2055-WCO
ASSOCIATED CONTRACTORS, INC., ET AL.	:	

ORDER

Presently before the court are the following motions: . . . (3) the motion of Bituminous for attorney's fees and costs of litigation pursuant to rule 11 against plaintiff; . . .

THE MOTION OF BITUMINOUS FOR RULE 11 SANCTIONS

Federal Rule of Civil Procedure 11 provides in pertinent part that:

> [The person signing the pleading certifies] that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is *well grounded* in fact and is warranted by existing law or a good faith argument for the extension, modi-

> fication, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

(emphasis added). Thus, rule 11, as it was amended in 1983, incorporates the objective standard of "reasonableness under the circumstances", which is a standard more stringent than the original good faith formula. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc). What constitutes a reasonable inquiry

> "may depend on such factors as how much time for investigation was available to the signer [and] whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar."

Id. at 1556 (quoting the Advisory Committee Note to rule 11). As at least one court has observed, however, if a reasonable inquiry beyond speaking to one's client would reveal the correct facts, the attorney does not satisfy his obligations pursuant to rule 11 by only speaking with his client about the case. *Coburn Industries, Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D.N.C. 1985).

This dispute stems from a fire that occurred at a property owned by the plaintiff in Harkers Island, North Carolina. The plaintiff entered into a contract with defendants Associated and Hoffman to repair the roof of its church located on Harkers Island. The contract was arranged and negotiated by Building Consultant Services, Inc. (BCS), who was retained by the plaintiff to ensure that all

contract requirements were met by Associated and Hoffman.

One of the prerequisites to the contract entered into between the plaintiff and Associated was that Associated must procure liability insurance and provide the plaintiff with a certificate of insurance before the contract was signed. It was the responsibility of BCS to ensure that there was a certificate of insurance.

The President of BCS, Roger DeLisle, assured the plaintiff that all of the prerequisites to signing the contract had been met, including the plaintiff having a certificate of insurance from Associated. Based upon that information, the plaintiff signed the contract for roofing repairs with Associated. It is undisputed that BCS did not have a certificate of insurance at the time DeLisle assured the plaintiff that the prerequisites to the contract had been fulfilled. DeLisle contends that Hoffman had assured him that a certificate of insurance would be forthcoming and that he relied on Hoffman's assurances.

On April 10, 1985, a fire occurred at the church owned by plaintiff at Harkers Island. On that day, Associated had spent at least some of the day roofing the church. Plaintiff contends that the cause of that fire was the negligence of the roofers in leaving a fire smoldering at the work site, which later gained in intensity causing substantial damage to the church structure.

On September 24, 1986, more than one year after the fire underlying this dispute, plaintiff filed suit in this court naming as defendants Associated Contractors, Inc.; Russell E. Hoffman; Jimmy Beck; Alpha Professional Services, Inc.;

and Bituminous Casualty Corporation. The only claim made against Bituminous in the complaint was that plaintiff relied to its detriment on a certificate of insurance, which was received before the fire, provided by Bituminous' agent Alpha that allegedly certified that Associated had procured liability insurance in the amount of $500,000.00 from Bituminous through Bituminous' agent Alpha. The complaint further states that although an investigation had revealed that the certificate was fraudulent, Bituminous was bound by the actions of its agent Alpha and, therefore, was liable to plaintiff.

The pending rule 11 motion centers around the allegation by plaintiff that it relied to its detriment upon a certificate of insurance in its possession before the fire occurred. Bituminous contends that plaintiff either knew or should have known, if it had conducted a reasonable inquiry as required by rule 11, that plaintiff never had a valid certificate of insurance before the fire.

In support of its motion, Bituminous relies upon the deposition of Leo J. Findlay. Findlay was the regional manager for the plaintiff in the region in which the church property located in Harkers Island was located. In Findlay's deposition he stated that he had been advised that the plaintiff did not receive a certificate of insurance until after the fire occurred. He further testified that he might have received that information about the certificate within two or three months after the fire. (Findlay deposition at 20-21).

Bituminous also relies upon an affidavit given by Roger DeLisle, the President of BCS, on November 11, 1986. In that affidavit, DeLisle stated that he did not have a certificate of insurance from Associated until after the fire loss. Bituminous further relies upon the deposition of DeLisle taken

on February 24, 1987 in which he stated once again that he did not have a certificate of insurance from Associated until after the fire.

Bituminous repeatedly requested plaintiff to dismiss the action as it related to Bituminous. Bituminous alleges that on January 29, 1987 and February 11, 1987, attorney John Bovis, who is counsel of record for Bituminous, requested that plaintiff dismiss Bituminous. By letter dated March 16, 1987, Bovis gave plaintiff notice that if the plaintiff did not dismiss Bituminous as a party by the end of that month and agree that neither Hoffman or Associated was insured by Bituminous, that Bituminous would pursue a rule 11 motion against the plaintiff. At the time Bovis wrote the March 16th letter, the parties had conducted considerable discovery and all evidence at that point revealed that plaintiff did not have a certificate of insurance before the fire. Plaintiff did not dismiss Bituminous during that month. On July 9, 1987, plaintiff filed a motion to dismiss Bituminous as a party, which was granted by order of August 17, 1987. During the time the motion to dismiss Bituminous was pending in this court, Bituminous filed the instant motion for rule 11 sanctions.

In opposition to the motion, plaintiff relies primarily on the affidavit given by DeLisle on January 31, 1987, in which he stated that he did have a certificate of insurance before the fire and refuted any statements to the contrary given in the November 11, 1986 affidavit. The plaintiff also points out that later in Findlay's deposition, Findlay stated that the first time he really understood that there had been a difference in the time that the certificate was received was the day of his deposition. (Findlay deposition at 64).

There are several factors that make rule 11 sanctions appropriate in this case. Rule 11 requires a reasonable inquiry by plaintiff's attorney before the complaint is filed. It would seem that a reasonable inquiry in a case such as this one would include a review of the certificate upon which the plaintiff allegedly relied and an investigation concerning exactly when that document was received. Obviously such an investigation was not undertaken in this case. Since this case was filed more than one year after the fire, there was sufficient time for plaintiff to make a thorough investigation before filing suit.

The statement given by Findlay at his deposition shows that the plaintiff's representatives knew possibly as early as a few months after the fire that there was a problem with the insurance certificate, although Findlay apparently was not informed what the specific problem was. This court found troublesome the testimony of DeLisle that no one on behalf of the plaintiff ever questioned him, before the law suit was filed or thereafter, about when he received the certificate in question. (R. DeLisle deposition at 84).

On the other hand, DeLisle has changed his story on at least three occasions, proving that his testimony can not be relied upon by anyone, including the plaintiff. The testimony of Findlay does not illustrate that the plaintiff knew that the certificates were received after the fire, only that there was a problem with the certificate. In the letter of March 16, 1987, Bovis requested that plaintiff not only dismiss Bituminous, but also agree that neither Hoffman or Associated was insured by Bituminous. Whether Bituminous has a valid policy of insurance with Associated and Hoffman is one of the issues about which Bituminous seeks

declaratory relief. Also, Bituminous did not file its motion for rule 11 sanctions immediately after the end of the time Bituminous gave plaintiff to dismiss it. Instead, it waited approximately four months and filed its motion after plaintiff had filed a motion to dismiss Bituminous with prejudice, and after plaintiff had filed a motion to amend its complaint to remove the disputed allegations contained in the first complaint.

Furthermore, when Bituminous filed its answer, it also filed cross-claims seeking, *inter alia*, a declaration that there is no valid contract of insurance between Associated and Bituminous and a declaration that Bituminous owed no duty to defend defendants Hoffman, Associated, and Jimmy Beck. Thus, although some of the attorneys' fees incurred by Bituminous before its dismissal were related to the claims against it contained in plaintiff's complaint, some of the fees also stemmed from discovery on the cross-claims filed by Bituminous. In fact, since Bituminous was dismissed by plaintiff, it has continued to file as many pleadings as it did before its dismissal.[1]

After careful consideration of the factors that weigh in favor of assessing rule 11 sanctions and the factors that weigh against assessing rule 11 sanctions, the court finds that rule 11 sanctions are appropriate in this case. A reason-

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[1] This case is one of the more burdensome cases that this court has encountered. The case is regularly on submission to this court on one or more motions. Although some of the motions have been meritorious, many motions have been frivolous. The lack of cooperation between the parties and their counsel has forced the court to spend considerable more time than it should have to spend on a case of this kind to resolve the numerous disputes that have plagued this case.

able inquiry in this case by plaintiff should have included an examination of the certificate of insurance that plaintiff allegedly relied upon and an investigation into when the certificate was received by the plaintiff or plaintiff's representatives before the factual allegation that plaintiff relied upon the certificate of insurance *received before the fire* was included in the complaint. Although plaintiff contends that the reliance on a certificate received before the fire is insignificant to its claims against the defendants, the factual allegation that plaintiff had a certificate in its possession which it thought was valid underlies all the plaintiff's allegations of fraud and conspiracy against defendant Alpha. (see original complaint at para 26-28, 30-32, 34, 36-40, 42-43, and 49). The complaint further alleges that Bituminous, as principal for Alpha, is bound by the fraudulent acts of its agent. (See original complaint at para 29 and 35).

The court further finds, however, that the request for attorneys' fees as rule 11 sanctions requested by Bituminous should be limited. Shortly after receiving the March 16, 1987 letter, plaintiff filed a motion to amend its complaint to add a party and also to rephrase its complaint against the defendants by removing the language that plaintiff relied upon a certificate of insurance that it received before the fire. After plaintiff filed its motion to amend the complaint, Bituminous filed a motion for summary judgment based upon the allegations contained in the first complaint. Although the motion was not improper, the more prudent course of action under the circumstances would have been to seek permission to file the motion for summary judgment after the court decided whether it would allow plaintiff to amend the complaint. The court's ruling on plaintiff's motion to amend

its complaint mooted the motion of Bituminous for summary judgment.

On September 15, 1987, John Bach, who is also counsel of record for plaintiff, filed an affidavit segregating with sufficient detail the work done and expenses incurred in connection with the plaintiff's complaint against Bituminous. The court has reviewed the affidavit and finds that the hours expended and the rates charged are reasonable under the circumstances of this case. The other expenses listed by Bituminous also appear to be reasonable to defend against the allegations contained in plaintiff's complaint.

Bituminous expended approximately 219.6 hours of attorney time in connection with plaintiff's complaint. Of that time, 21.2 hours was spent on Bituminous' motion for summary judgment. Legal assistants working for Bituminous expended 20.75 hours in connection with the plaintiff's complaint. Of that time, 5.5 hours was spent on the motion for summary judgment. The court approves the following fees and expenses as rule 11 sanctions against plaintiff: (1) 198.4 hours of attorney time at the rate of $85.00 per hour for a total of $16,864.00; (2) 15.25 hours of legal assistant time at the rate of $45.00 for a total of $686.25; (3) expenses in the amount of $1,510.36; and (4) court reporter fees and witness fees in the amount of $831.38. Accordingly, the court assesses the amount of $19,891.99 as rule 11 sanctions against plaintiff and counsel for plaintiff jointly and severally.

In summary, the court: . . . (3) grants the motion of Bituminous for rule 11 sanctions and assesses $19,891.99 as rule 11 sanctions against plaintiff and counsel for plaintiff jointly and severally; . . . .

IT IS SO ORDERED this 9th day of March, 1988.

/s/ WILLIAM C. O'KELLEY
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS	:	
VERSUS	:	1:86-cv-2055-WCO
ASSOCIATED CONTRACTORS, INC., et al.	:	

ORDER

Presently before the court is the motion of the plaintiff for reconsideration of the court's order granting the motion of Bituminous Casualty Corporation (Bituminous) for Federal Rule of Civil Procedure 11 sanctions. After careful consideration of the evidence and arguments submitted by plaintiff in support of this motion, the court denies the plaintiff's motion.

Plaintiff argues that the court failed to consider certain evidence that plaintiff investigated whether there was a certificate of insurance. Considering all evidence of the investigation in the light most favorable to plaintiff, the court finds that rule 11 sanctions were properly imposed in this case. Plaintiff knew at least a couple of months after the fire, and

well before this lawsuit was filed, that there was a problem with the certificate of insurance.

In fact, in counsel for plaintiff's affidavit submitted with this motion he states:

> After the three interviews of Mr. DeLisle had been conducted and carefully contemplated, three things were clear. Mr. DeLisle had received a certificate of insurance for Associated Contractors, Inc., on the Bituminous Casualty Company. He relied upon the certificate of insurance. Because of his poor memory, he could not remember when the certificate of insurance was actually received. On this specific issue, Mr. DeLisle's memory was admittedly unreliable.
>
> At my request, Bruce C. Jenkins was reinterviewed by Mr. Potts. I requested Mr. Potts to reinterview Russell E. Hoffman, but Russell E. Hoffman was not located by Mr. Potts. I interviewed the local representative of the Bituminous Casualty Corporation, William Jennings, on July 26, 1986; and a representative of the insurance commissioner of the State of Georgia, and various employees and officials of the Church. No information was received when the certificate of insurance had actually been received by Building Consultant Services, Inc.
>
> I concluded that the only person who could have definitely resolved the issue of when the certificate of insurance was received was Roger E. DeLisle.
>
> . . .
>
> I concluded that the memory of Mr. Roger E. DeLisle, through [sic] unreliable in July of 1986, was more likely to have been reliable in March of

> 1985 when plaintiff signed the contract and the date upon which DeLisle had made his representation to the Church that insurance and a certificate of insurance was present. I further concluded that there was no credible evidence to show that the certificate was received in any manner other than that which DeLisle related to the Church at the time the contract was signed and according to the issue date on the certificate of insurance. The Church relied upon the fact that there was a certificate of insurance though the certificate was contained in the files of Building Consultant Services, Inc. as this was the regular course of business between them.

(Affidavit of Tyrus R. Atkinson, Jr. at 5-7)

Obviously, counsel for plaintiff had notice even before the lawsuit was filed that there might be a problem with the insurance certificate. It appears that the lawsuit was filed with the hope that discovery would bring support for these allegations concerning the certificate, because according to the affidavit of plaintiff's counsel there was not one reliable witness who could testify about when the certificate was received.

The DeLisles are agents of the plaintiff. It was the plaintiff's obligation to ascertain exactly when the certificate of insurance was received by the DeLisles and clarify any questions concerning the certificate before filing suit.

The only connection that defendant Bituminous had with this case is that its name appeared on the certificate of insurance upon which the plaintiff alleged it relied before the fire occurred. During discovery, it became obviously [sic] that the DeLisles did not receive the certificate of insur-

ance before the fire. In fact, the DeLisles told both the plaintiff and the defendants that they did not have a certificate before the fire. After the DeLisles reputed their prior account that they had the certificate of insurance before the fire, Bituminous pleaded with plaintiff to release them from the case and warned that it would file a motion for rule 11 sanctions unless it was released. Plaintiff refused to release Bituminous until rule 11 sanctions were imminent.

Plaintiff's arguments in this motion for reconsideration of rule 11 sanctions seems to center on a plea from the plaintiff that it should not be held accountable for actions it took based upon its reliance on the DeLisles' statements. Plaintiff chose to make the DeLisles its agents. It is now stuck with the consequences of their inconsistent accounts of the facts. Plaintiff knew that they were unreliable even before the lawsuit was instigated. Knowing that they were unreliable, plaintiff should not have based allegations in the complaint on their statements. Plaintiff admits that it did not have any independent evidence that supported the veracity of their statements.

This court does not impose rule 11 sanctions unless they are appropriate. The court warned plaintiff as early as July 2, 1987, that sanctions might be appropriate in this case if Bituminous filed a properly supported motion for sanctions, as it had threatened. Plaintiff was slow to heed the court's warning and the pleas of Bituminous. Plaintiff must now suffer the consequences. If plaintiff had released Bituminous when the DeLisles' told plaintiff that they did not have a certificate of insurance before the fire, plaintiff could have avoided sanctions.

The dictate of rule 11 is clear, if a properly supported motion for rule 11 sanctions is presented to the court, the court *shall* impose rule 11 sanctions. The court finds plaintiff's arguments that the motion of Bituminous was not properly supported to be without merit.

For the reasons set forth above, the court denies the motion of plaintiff for reconsideration. The court also denies the request of Bituminous to award it attorney's fees for responding to this motion.

IT IS SO ORDERED this 13th Day of June, 1988.

/s/ WILLIAM C. O'KELLEY
United States District Judge

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-8466

CORPORATION OF THE PRESIDING BISHOP
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, Plaintiff-Appellant,

versus

ASSOCIATED CONTRACTORS, INC.,
RUSSELL E. HOFFMAN, JIMMY BECK,
ALPHA PROFESSIONAL SERVICES, INC., Defendants,

BITUMINOUS CASUALTY
CORPORATION, Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 20, 11 Cir., 1989, ___ F.2d ___).

(October 4, 1989)

Before KRAVITCH and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active ser-

vice on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

Appendix E

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the rea-

sonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1054

In The

Supreme Court of the United States

October Term, 1989

BITUMINOUS CASUALTY CORPORATION,

Petitioner,

vs.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS AND TYRUS R. ATKINSON, JR.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TYRUS R. ATKINSON, JR.*
Counsel of Record for Respondents
ATKINSON, YOUNG & UNTI
Suite 111
Four Piedmont Center
3565 Piedmont Road
Atlanta, Georgia 30305
(404) 266-1043

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTION PRESENTED

Whether Rule 11 sanctions are appropriately addressed against a party when that party refuses to dismiss its action after discovery reveals that the Complaint is not well grounded in fact and law.

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No. 89-1054

In The

Supreme Court of the United States

October Term, 1989

BITUMINOUS CASUALTY CORPORATION,

Petitioner,

vs.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS AND TYRUS R. ATKINSON, JR.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

After a fire ignited by a roofing contractor caused substantial damage to one of Respondent's church buildings; Respondent attempted to invoke the insurance coverage of the roofing contractor shown on a certain certificate of insurance produced under contract provisions of Respondent's contract with the roofing contractor which required the contractor to have liability insurance and to produce a certificate of insurance to that effect. (R-1-1-1). When no response was received from the Petitioner who was shown as insurer of the roofing contractor on the certificate of insurance, Respondent

retained an experienced arson and fire investigator to conduct an investigation. The investigator did a full and complete investigation of the facts of the case and interviewed every witness who was thought to have any information. (R7-158-Exhibit A). The consultant and owner's representative retained by the Respondent to negotiate the contract with the roofing contractor on behalf of the Respondent, told Respondent that all insurance requirements including the certificate of insurance had been complied with by the roofing contractor in a conference held before the contract was signed and well before the fire. (Affidavit: L.J. Findlay). The consultant told the arson and fire investigator that he had received a certificate of insurance before the fire showing the roofing contractor to be insured by Petitioner. (R7-158-Exhibit A). After the case was referred by Respondent to counsel for litigation, the consultant was reinterviewed by the investigator and by counsel. (R7-158-Exhibit B). Complaint was filed alleging that the certificate of insurance was received by the consultant before the fire. (R1-1-1). A month after the Complaint was filed counsel for Petitioner directly contacted the consultant and obtained from him an affidavit stating he had never had a certificate of insurance at all and never even requested one. (R1-7-Affidavit: Roger E. DeLisle). Counsel for Respondent, when they became aware of this affidavit, reinterviewed the consultant, who repudiated the affidavit and made a new affidavit stating that he had received a certificate before the fire. (R5-107-Exhibit A). The consultant later changed his testimony again stating that he had actually received three certificates of insurance after the fire. (Deposition: Roger E. DeLisle). After the final change

of testimony by the consultant, Respondent amended the complaint, replacing the allegation that a certificate had come in before the fire with an allegation that the certificate had come in after the fire. (R1-48-1). Petitioner was dismissed with prejudice and the case proceeded to trial against the remaining defendants. (R4-90-1) (R8-188-1).

REASONS FOR NOT GRANTING THE WRIT

I. THE QUESTION PRESENTED FOR REVIEW BY PETITIONER IS NOT IN ACCORD WITH THE FACTS OF THIS CASE.

Petitioner makes it appear that Respondent refused to dismiss its action after discovery revealed that the Complaint was not well founded in fact and law.

The only item in issue was one single factual allegation in a lengthy Complaint. The single factual allegation did not undermine the entire case. *Compare Oliveri v. Thompson*, 803 F. 2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986). The consultant witness changed his testimony after the Complaint was filed on this issue on at least three occasions leaving not only Respondent, but all parties, unsure of what the ultimate trial testimony of this witness would be.

Before discovery was completed, Respondent amended its Complaint to take out the disputed allegation and dismissed Petitioner, with prejudice. (R4-90-1). Petitioner objected to being dismissed with prejudice and insisted upon remaining in the case.

Respondent did not dismiss Petitioner because its Complaint was not well founded in fact and law. It was. Petitioner was dismissed because the cost of proceeding against Petitioner's numerous filings was making the case unduly expensive to pursue. (R4-90-1).

II. THE ALLEGED CONFLICT IN THE CIRCUITS IS ILLUSORY, SINCE THE CASES CAN BE RECONCILED.

Petitioner contends that the basic issue in this case is whether Rule 11 imposes a continuing duty upon an attorney to discontinue the litigation when discovery reveals that the claim is groundless in fact and law.

That was not the basic issue in this case. The issue was whether the Complaint was well grounded in fact and law after a reasonable pre-filing inquiry under Rule 11, *F.R.Civ.P.* Petitioner apparently now concedes that the Complaint was well grounded in fact and in law, as found by the Eleventh Circuit Court of Appeals, since that issue is not contested in the Petition.

Petitioner's question presented, though not the controlling issue in this case, is unsupported by the authorities cited in support of the alleged conflict between the circuits.

Petitioner first contends that the Eleventh Circuit rejected a prior contrary holding in *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987). In *Collins* counsel filed a complaint and after discovery dismissed the complaint. A second complaint was filed on the same facts and grounds as was the first complaint. The filing of the second complaint was found to be the Rule 11 violation.

When the trial court held that the litigant and counsel should discontinue their quest, the court was referring to a discontinuance of the suit after the first filing and discovery revealed no merit to their claim. The filing of the second complaint knowing what had been discovered during the proceedings on the first complaint was the violation. Petitioner's contention that *Collins* is a contrary holding to this case is both inaccurate and misleading.

Petitioner misstates the holding in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) in an attempt to show a conflict within the Circuits. Petitioner states that *Thomas* held Rule 11 "does not apply to subsequent actions or filings by an attorney after the litigation has commenced." (Petition: p.8). *Thomas* held that "Rule 11 applies to each and every paper signed during the course of the proceedings and requires that each filing reflect a reasonable inquiry." *Thomas v. Capital Security Services, Inc.*, supra at p. 875. None of the cases cited by Petitioner supports the conflict Petitioner attempts to show by misstating *Thomas*. The cases are fully in accord with what *Thomas* actually held regarding subsequent pleadings.

Petitioner next contends that the Second Circuit is in conflict with the Eleventh Circuit citing *City of Yonkers v. Otis Elevator Company*, 844 F. 2d 42 (2nd Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986); and *Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71 (2nd Cir. 1985).

A close reading of the *Yonkers* case shows that the filing of the complaint constituted the *Rule 11* violation.

Counsel for *Yonkers* had in hand all of the contract documents which should have shown him that the claims asserted in the Complaint were not well founded in fact or law. The trial court found sanctions "for filing fraud claims that 'lacked any colorable factual basis' ." *City of Yonkers v. Otis Elevator Company,* supra at p. 44. This language clearly refers to the Complaint. The trial court elected, in its discretion, to limit sanctions. *Yonkers* is a case where a complaint was filed lacking any colorable factual basis. This case does not conflict with *Oliveri.*

Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71 (2nd Cir. 1985), is a per curiam opinion with insufficient facts to determine if the plaintiff filed additional pleadings in continuation of his action so as to justify sanctions. The case was not remanded on Rule 11 grounds. It was remanded to determine if the prevailing party should recover attorneys' fees under 42 *U.S.C.* 1988 and 2000e-5K. It is not even a *Rule 11* case, Respondent contends, and represents no finding of a continuing duty under Rule 11, *F.R.Civ.P.* to dismiss a pleading. This case is not in conflict with *Oliveri v. Thompson* nor the Eleventh Circuit.

Petitioner contends that the Seventh Circuit is in conflict with the Eleventh Circuit. Petitioner cites in support the cases of the *Flip Side Productions, Inc. v. Jam Productions, Ltd.,* 843 F.2d 1024 (7th Cir. 1988) and *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.,* 809 F.2d 451 (7th Cir. 1987).

The *Pantry Queen* case was one where the complaint was found to be "specious" and not well founded in fact or law. *Id.* at p. 452. A negligent failure to inquire into the

facts occurred. It is fully in accord with *Oliveri v. Thompson*, 803 F.2d 1265, cert. den. 480 U.S. 918 (2nd Cir. 1986), which is cited therein and in accord with the Eleventh Circuit in this case.

Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024 (7th Cir. 1988), while containing language which might appear to support Petitioner's argument, does not actually do so upon careful examination. It is clear from reading the opinion, that Flip Side's complaint against Tempo was not well grounded in fact or law. Tempo only thought itself entitled to its fees in preparing material after discovery was closed. This is what Tempo requested and that was the issue before the court. The court found Tempo entitled to those limited sanctions. Had Tempo requested sanctions from the time the amended complaint was filed, it may well have prevailed. This case does not stand for the proposition that a complaint proper under *Rule 11* can become a sanctionable violation, after discovery, where no further filings are made, which is the position Petitioner takes. *Flip Side* is not in conflict with the Eleventh Circuit in result.

Petitioner contends that the First Circuit conflicts with the Eleventh Circuit, citing *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988). *Muthig* is clearly a case where the complaint was not well grounded in fact as to the defendant requesting *Rule 11* sanctions. Both the clients and their attorney should have known this when the complaint was filed. The case says nothing about a continuing duty nor does it support Petitioner's theory in any way. The case is certainly not in conflict with the Eleventh Circuit.

Petitioner contends that the Sixth Circuit is in conflict with the Eleventh Circuit, citing *Herron v. Juniper Transportation Company*, 858 F.2d 332 (6th Cir. 1988). This case does refer to a continuing duty. This refers to review of a complaint filed in state court when removed by an opponent to federal court. The court held that a minimal inquiry into the facts subsequent to removal would have disclosed that the complaint was without factual or legal support. What the court held in *Herron* was that when a complaint which would have been a *Rule 11* violation if filed in federal court, is filed in state court, then removed to federal court, such complaint then becomes a pleading subject to *Rule 11*. The continuing duty here referred to is not the continuing duty contended by Petitioner. The Complaint in this case was a *Rule 11* violation at the time it was filed in federal court. Sanctions were proper under *Rule 11*. In result this case is not in conflict with the Eleventh Circuit.

The *Herron* court discusses the continuing obligation that it finds in *City of Yonkers v. Otis Elevator Company*, supra, and *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, supra. Respondent contends that neither truly illustrate this continuing obligation. *Yonkers* and *Flip Side* reveal not a continuing obligation but simply a reluctance to impose Rule 11 sanctions upon parties who had filed complaints in violation of Rule 11 for attorney fees incurred before the completion of discovery, Respondent contends. *Yonkers* and *Flip Side* are not cases where a more stringent application of Rule 11 was applied, as Petitioner seems to be contending, but are cases where a more lenient standard was applied.

Petitioner cites *Michaels Building Company v. Ameritrust, Co.*, 848 F.2d 674 (6th Cir. 1988) in its Table of Authorities but does not discuss the case in the Petition. It is not even a Rule 11 case and does not hold any continuing duty to dismiss under Rule 11, *F.R.Civ.P.*

Petitioner cites *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d 613 (8th Cir. 1988), as authority for a conflict in Circuits. This case differs from the others cited in that the award of sanctions falls under the other prongs of *Rule 11* relating to improper purpose, harrassment and unnecessary delay and the similar provisions of 28 *U.S.C.* 1927. The court found the conduct of counsel constituted a pattern of uncooperativeness and delay begun before litigation even commenced and continuing through the litigation. This case has nothing to do with factual inaccuracies. Respondent agrees that counsel have a continuing duty not to act for an improper purpose. Those prongs of *Rule 11* are not in this case. Respondent does not see this case to be in conflict with the Eleventh Circuit.

Gaiardo v. Ethyl Corporation, 835 F.2d 479 (3rd Cir. 1987), is not in conflict with the Eleventh Circuit.

The Eleventh Circuit opinion in this case is not in conflict with any rulings of this Court and, Respondent contends, complies with the plain meaning standard set out in *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989).

In summary, none of the cases cited by Petitioner hold that a complaint which is not a *Rule 11* violation when filed can become a *Rule 11* violation by what is learned in discovery. This is the position Petitioner must

sustain since it does not challenge in its Petition the correctness of the Eleventh Circuit finding that no *Rule 11* violation occurred upon the filing of the complaint. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938 reh. den. en banc 888 F.2d 1389 (11th Cir. 1989).

Each of the cases cited by Petitioner are cases where the *Rule 11* violation occurred upon the filing of the complaint or answer. The various courts chose to impose sanctions differently, within their discretion, according to the individual facts of each case.

Respondent concedes that each and every document filed in a case must comply with the requirements of *Rule 11*. There is a continuing duty not to violate *Rule 11* by any such filing. Petitioner concedes that there were no such filings in this case.

Petitioner flatly states that the First, Second, Sixth, Seventh, and Eighth Circuits clearly hold that *Rule 11* does in fact impose a continuing obligation on an attorney such that Rule 11 would require an attorney to dismiss a claim that discovery reveals is groundless or suffer sanctions. (Petition: p.18). Respondent can find no such authority in the cases cited by Petitioner.

The only case cited which discusses a continuing obligation of the type contended by Petitioner is *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987). As Petitioner points out, the Fifth Circuit rejected the *Robinson* continuing obligation approach in the en banc decision in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

Though continuing duty is mentioned in several of the cases cited by Petitioner, the cases themselves explain what is meant within the context of the facts of that particular case. Those references do not illustrate the holdings Petitioner contends exists in those cases, it is contended.

Respondent argues that all of the cases cited by Petitioner are compatible. Though continuing duty is mentioned in some of the cases, no continuing duty of the kind contended by Petitioner, has been imposed upon any party in any of these cases under Rule 11, *F.R.Civ.P.*

III. THE RIGHT AND FAIR RESULT WAS REACHED BY THE ELEVENTH CIRCUIT COURT OF APPEALS AND EVEN IF PETITIONER WERE TO PREVAIL ON THIS WRIT THE RESULT WOULD NOT LIKELY CHANGE, BUT THERE WILL BE A SUBSTANTIAL EXPENDITURE OF RESOURCES BY THE COURTS AND COUNSEL TO NO VALID PURPOSE.

Sanctions in the trial court were not limited to some period where Respondent had a continuing duty to dismiss its suit against Petitioner. Sanctions were imposed from the date the complaint was filed to the date Petitioner was dismissed. The trial court found that no prefiling inquiry had been done and that the complaint constituted a *Rule 11* violation. This finding was an abuse of discretion and was reversed in a well reasoned opinion of the Eleventh Circuit Court of Appeals. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938 reh. den. en banc 888 F.2d 1389 (11th Cir. 1989).

Even if there was found to be a continuing duty under *Rule 11* to dismiss when discovery demands, it would not likely change the result in this case. Respondent did amend before the end of discovery and did dismiss Petitioner from the case, with prejudice.

It is likely that if the courts involved were required to determine when the continuing duty began and ended, the result would be the same. It would simply be an unproductive use of judicial resources to no valid purpose.

Rule 11, F.R.Civ.P. places a responsibility upon a party and counsel to certify, by signing, that the document is well grounded in fact and is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for an improper purpose.

This language appears to apply to the time of signing and filing the document. Respondent contends that the holdings of the various courts cited in the Petition and Response interpret the Rule in this way. A *Rule 11* violation cannot, it is contended, arise solely from a continuing duty to dismiss. Any continuing duty in this respect concerns mitigation of damages from an earlier, true *Rule 11* violation.

IV. CONCLUSION

Respondent respectfully prays that the Petition for Writ of Certiorari be denied. Any conflict within the Circuits regarding whether there is a duty to dismiss after

discovery under *Rule 11*, which Respondent denies exists, has not developed to a point where it is ripe for review. The Circuits are proceeding to a consensus on matters relating to the imposition of *Rule 11* sanctions. It is too soon to know if any conflict will occur. The Eleventh Circuit Court of Appeals did not render the decision in this case in conflict with any other court of appeals nor did it depart from the accepted and usual course of judicial proceedings. There is no special or important reason to grant this Writ. Petitioner fails to show compliance with *Rule 17, Rules of the Supreme Court of the United States*, and for that reason and the other reasons raised in this Response, the Petition for Writ of Certiorari should be denied.

Petitioner respectfully prays that the matter of Petitioner misstating the holding in *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) which was followed by the Eleventh Circuit in this case, with the effect of purporting to show a conflict between the Circuits, and thus attempting to invoke the Court's jurisdiction under Rule 17(a), *Rules of the Supreme Court of the United States*, be considered under the provisions of Rule 49(2) and 50, *Rules of the Supreme Court of the United States*.

Respectfully submitted,

TYRUS R. ATKINSON, JR.*
Counsel of Record
for Respondents
ATKINSON, YOUNG & UNTI
Suite 111
Four Piedmont Center
3565 Piedmont Road
Atlanta, Georgia 30305
(404) 266-1043

*Counsel of Record